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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Judge

App. Case No. 2025-000364

Richard A. Gorman, ...Respondent,

v.

John C. Monarch, ...Appellant.

FINAL BRIEF OF RESPONDENT

David L. Moore Jr.
S.C. Bar No. 1509
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
dmoore@turnerpadget.com
and
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
Attorneys for Respondent

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DETERMINING THAT APPELLANT HAD ACTED IN EITHER BAD FAITH, WILLFUL DISOBEDIENCE, OR AT A MINIMUM IN GROSS INDIFFERENCE TO RESPONDENT'S RIGHTS UNDER THE APPLICABLE RULES OF DISCOVERY?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN STRIKING APPELLANT'S ANSWER AND COUNTERCLAIM RATHER THAN IMPOSING A LESS SEVERE SANCTION IN LIGHT OF ITS FINDINGS OF SEVERE ABUSE BY APPELLANT OF RESPONDENT'S DISCOVERY RIGHTS?

3. DID THE TRIAL COURT OPERATE WITHIN ITS DISCRETION TO WEIGH THE CONFLICTING EXPERT TESTIMONY REGARDING APPELLANT'S DESTRUCTION OF COMPUTER EVIDENCE TO DETERMINE THAT APPELLANT HAD ACTED IN BAD FAITH AND GROSS INDIFFERENCE TO RESPONDENT'S RIGHTS OF DISCOVERY?

4. DID THE TRIAL COURT PROPERLY DETERMINE THAT RESPONDENT'S RIGHTS TO DISCOVERY WERE SO TRAMPLED UPON AS TO DESTROY RESPONDENT'S ABILITY TO PROPERLY ESTABLISH HIS CASE?

5. DID APPELLANT PRESERVE ALL HIS ARGUMENTS FOR REVIEW?

STATEMENT OF THE CASE

This appeal arises from an order issued by Judge Perry Gravely striking Appellant's answer due to his bad faith failure to comply with discovery, despite prior orders requiring him to do so. (R. pp. 94-106.) Judge Gravely found that Appellant violated discovery orders over a period of several years and found Appellant's discovery misconduct included failing to identify and produce for examination all the electronic devices Appellant had agreed in a consent order to identify and produce, failing to maintain the integrity of the data on his electronic devices after knowing the data was sought by Respondent, failing to take any steps to preserve evidence of Appellant's written communications with a material witness shortly before the witness' deposition, causing Respondent to go to extraordinary lengths to try to obtain data about Appellant's digital actions, and deliberately altering or removing data from a laptop device in an attempt to stymie Respondent's case against him. (R. pp. 94-106.)

The parties have been involved in protracted litigation essentially regarding an alleged blackmail scheme against Respondent which blossomed into alleged defamatory statements by each party against the other. (R. pp. 157-84.) In 2013, emails sent anonymously demanded Respondent pay millions of dollars in Bitcoin cryptocurrency or face ruin. (R. p. 160.) Respondent did not pay the money demanded, and highly derogatory and misleading internet postings followed that contained false information about Respondent, including that Respondent was a child molester and that he had raped a certain adult woman. (R. pp. 160-64.) Because the issues originally arose out of electronic transmissions over the internet with the actual author being concealed and

thus unknown to Respondent, it became important to obtain documentation through discovery of those electronic transmissions.

Respondent had reason to believe Appellant was behind the attempted blackmail and the internet postings. (R. p. 94.) Appellant, who had recently launched a business that competed with one of Respondent's, had come to Respondent's attention by making an unanticipated and unsolicited hostile statement toward him on Twitter. (R. pp. 159-60.) Respondent initially forwarded a preservation letter to Appellant on December 20, 2013, before this suit was brought. (R. pp. 96, 510-14.) The letter notified Appellant that he should preserve all of his electronic data. (R. pp. 96, 510-14.)

In 2014, after this suit was brought, Respondent served extensive discovery requests, including requests regarding electronic devices, laptop computers, and cellular phones among them. (R. pp. 316-82.) This case was placed on hold on December 1, 2015, by a stay to allow the resolution of litigation in Federal Court in Pennsylvania between the parties. (R. p. 1.) After the Pennsylvania action was dismissed for lack of sufficient contacts between Appellant and the state of Pennsylvania, that stay was lifted on August 16, 2016. (R. pp. 4-6.)

On March 15, 2018, Respondent filed a motion to compel due to incomplete discovery responses by Appellant. (R. pp. 285-384.) Believing that motion to be resolved by agreement, Respondent's counsel withdrew the motion shortly before it was scheduled to be heard. (R. pp. 96, 442-44.) The issue was apparently not resolved, as the discovery was not forthcoming, and Respondent again moved to compel. (R. pp. 96, 487-89.) On August 21, 2020, the parties entered into a consent discovery order pursuant to which

Appellant was to identify electronic devices for inspection and expeditiously provide to Respondent any identified devices chosen by Respondent for examination. (R. pp. 31-35, 96.) With trial looming and discovery only just having gotten underway, the parties entered into a consent order that struck the case from the active roster under Rule 40(j), SCRCP. (R. pp. 36-38.)

Appellant identified a MacBook Pro laptop and an iPhone 5. (R. pp. 569-73, 577, 581-83.) Appellant asserted he did not have possession of either device. (R. pp. 569-73, 577, 581-83.)

Respondent filed motions to compel production of the electronic devices and a motion for sanctions based on Appellant's destruction of or failure to preserve the materials sought in discovery. (R. pp. 501-49.) The motions were set for a hearing in early 2021, but the court declined to hear them until the case was restored to the active docket. (R. pp. 39-41.)

Appellant then stated that he did, in fact, have the laptop he had identified. (R. pp. 566, 581-83.) After inquiry by Respondent's counsel about providing the laptop for examination, Appellant refused. (R. p. 52.) Appellant claimed that some devices were gone, stating that he had allowed them to be taken from him or had turned them over to others when he bought new devices. (R. pp. 566, 581-83.) During the next portion of the litigation, Appellant then took inconsistent positions with regard to what devices he had kept and what he had gotten rid of. (R. pp. 51-52.) Appellant, who had agreed earlier "to cooperate concerning the expeditious provision of such devices from the list as the Plaintiff may select for examination by the Plaintiff or such persons as he may

choose[,]" with no restrictions on access by Respondent or his examiners, then took the position that he would not turn any devices over for any examination without significant privilege and privacy safeguards. (R. pp. 32, 52.)

The parties restored the case to the active docket, under a new case number, in July of 2021. (R. pp. 42-44.)

In September of 2021, the Honorable Alex Kinlaw heard the motions to compel and for sanctions, and he issued Form 4 orders that, respectively, directed Plaintiff's counsel to prepare an order granting the motion to compel and continued the sanctions issue pending the compelled production. (R. pp. 45-50.) That prompted communications between counsel and status conferences with Judge Kinlaw in which the court and counsel attempted to assuage Appellant's concerns about privacy and privilege. Eventually, on March 28, 2022[1], Judge Kinlaw ordered Appellant to turn over the devices for examination and put in place significant safeguards to address Appellant's concerns, such as having an independent expert examine the devices first to weed out likely privileged or irrelevant material. (R. pp. 51-58.) Appellant was to produce the laptop to a neutral expert. (R. pp. 53.) Sanctions were held in abeyance. (R. pp. 51.)

Appellant declined to comply with the order and turned nothing over for examination. Instead, he moved to reconsider Judge Kinlaw's order and, before the court took any action on the motion to reconsider, appealed the order. (R. pp. 75-76, 637-75, 676-77, 1061.) This court dismissed the appeal, finding it to be interlocutory. (R. pp. 71.)

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[1] The same order was filed on April 27 of that year, for reasons not known to the parties.

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After issuance of the remittitur, the trial court heard and denied Appellant's motion to reconsider and reaffirmed its previous order on January 12, 2023. (R. pp. 75-76.) On February 10, 2023, Respondent filed a motion for sanctions, asserting Appellant had refused to comply with the court's order. (R. pp. 696-703.) On April 28, 2023, the court reaffirmed its previous decision and noted that Appellant had refused to permit digital imaging of the laptop, possibly in bad faith. (R. pp. 78-84.) The court directed that Appellant comply with the prior consent order or have his answer stricken and be fined $7,500. (R. pp. 82-83.)

Appellant then supplied a laptop to the neutral expert, Steve Abrams. (R. pp. 1144-49.) Abrams noted that the laptop contained what appeared to be a digital copy of an iPhone 5 and also noted there were discrepancies in the metadata of the laptop, indicating that the information had been manipulated. (R. pp. 1161-64.) Among the files that were left on the laptop were items of text and images that were components of defamatory internet postings about the Respondent. (R. pp. 112-25, 1144-49, 1161-97.)

After segregating out information deemed privileged, irrelevant, or inappropriately private, the neutral expert then provided Respondent's retained expert with an electronic image (in layman's terms, a copy) of the remaining data on the laptop for that expert's review and investigation. (R. pp. 1164-97, 1228-34, 1236-39, 1240-42.) Respondent's retained expert also found evidence indicating that the information on the laptop had been manipulated, including the user-directed destruction of .bash data that showed what websites Appellant had used. (R. pp. 1237-39.) The experts also noted that the laptop had been used to access or run a "virtual machine," accessing another computer device

through the laptop. (R. pp. 1144-49, 1221-43.) That other computing device was never identified, in discovery or otherwise, by Appellant, though Respondent's discovery requests asked him to name the electronic devices he used during the relevant time period. (R. pp. 521-22.)

Appellant also retained an expert, Ian Finch, to examine the laptop, and Appellant's expert issued an opinion generally indicating that no data replacement had occurred and that the laptop turned over was the laptop Appellant had used. (R. pp. 1329-1333.)

Respondent took Appellant's deposition. (R. pp. 1355–1396.) Respondent had already taken the deposition of Illya Shpetrik, who acknowledged in that testimony and in an affidavit that he did some internet posting defaming Respondent after being encouraged by Appellant to do so. (R. pp. 1334-38.) In his deposition, Shpetrik testified that he had communicated with Appellant shortly before the deposition through the digital platform Telegram, which had been set to automatically delete the messages between them and did so. (R. pp. 1344-1345.) Appellant admitted to communicating with Shpetrik via Telegram and acknowledged he did nothing to preserve those communications for discovery, even though he knew how to do so. (R. pp. 1386, 1387-88, 1389-92.)

On February 26, 2025, the court issued the appealed order, which found that the court had given Appellant numerous opportunities to rectify his discovery deficiencies. (R. pp. 94-106.) The lack of appropriate responses was found to demonstrate a pattern of deceit and destruction of material evidence. (R. p. 102.) These actions by Appellant were found to have undermined the entire discovery process and to have ignored court orders. (R. p. 104.) The court went on to state there had been no meaningful discovery

compliance by Appellant and that this non-compliance was either in bad faith, willfully disobedient, or at least grossly indifferent to Respondent's discovery rights. (R. pp. 104.) As a result, Appellant was found in contempt and had his answer stricken and was fined $7,500. (R. p. 105.)

Appellant did not move under Rule 59, SCRCP, with regard to the sanctions order but, instead, brought this direct appeal.

STATEMENT OF THE FACTS

Appellant is a digitally savvy individual who minored in computer science in college and has been known to hack into business associates' computers to help them gain access when they became locked out of their devices. (R. pp. 1351, 1354). Appellant resisted the most relevant discovery in the case – examination of his computing devices – for nearly a decade. His compliance with his discovery obligations came haltingly and partially, when it came at all, and was accompanied by resistance at every step. Appellant refused to comply with a consent order and then refused to comply with an order that included safeguards he had demanded. He appealed an unappealable discovery order, creating even more delay in this very old case. After that appeal failed and he had failed to comply with multiple orders giving him deadlines to turn the electronic devices over for examination, Appellant finally turned over his laptop. Upon examination of the laptop data, Respondent's expert and the neutral expert found that, a) years earlier, Appellant had deleted data from the laptop, data which might have connected Appellant directly to the compilation and posting of defamatory statements, postings that had contained material that was found on Appellant's computer, and b) the laptop was used to access

and operate *another* computer remotely, a computer that Appellant's discovery responses withheld from identification. (R. pp. 521-22, 1237, 1242-43, 1276-98.)

Appellant also communicated with his former co-conspirator Shpetrik in the days just before Shpetrik's deposition, knowingly using a digital platform he knew would delete the messages. (R. pp. 1344-45, 1386-88, 1393.) Despite knowing how to preserve the messages through the simplest of actions (by taking screenshots, digital photographs of his cell phone screen), Appellant did nothing to preserve the evidence of his communications with this witness. (R. pp. 1393-96.) If Shpetrik had not revealed the existence of the deleted Telegram communications in his deposition testimony, Respondent would never have known of them. (R. pp. 1344-46.)

Appellant's acts and omissions in destroying evidence and preventing Respondent from gathering evidence through discovery prompted the trial court to determine he had acted in such bad faith that striking his answer and counterclaim was warranted. (R. pp. 102-105.)

Litigation between the two parties has persisted for a number of years. Even before that, Appellant has known since a pre-suit preservation letter was issued to him in 2013 that his electronic devices and the data on them would be a focal point of discovery. (R. pp. 101-01, 510-14.) His acts following his receipt of that preservation letter, especially after a 2020 consent discovery order was entered into, highlight the extent of Appellant's indifference to Respondent's rights:

(1) December 20, 2013 – preservation letter issued to Appellant, requiring him to preserve relevant information, data and devices;

(2) 2014 – Respondent serves extensive discovery upon Appellant, specifically requesting production of relevant information contained on Appellant's computer and devices;

(3) Appellant fails to properly comply with the discovery requests, objecting to proper requests, providing insufficient answers, and failing to produce relevant material for examination;

(4) March 5, 2018 – Motion to compel is filed by Respondent;

(5) August 21, 2020 – Discovery issues are apparently resolved through a consent order, pursuant to which electronic devices are to be identified and provided;

(6) Appellant identifies for the first time a 2013 MacBook and an iPhone 5. Appellant indicates that the contents of the MacBook have been transferred to another computer and the contacts of the iPhone are lost;

(7) December 9, 2020 – Respondent files a motion for sanctions due to destruction of evidence by Appellant.

(8) Appellant then "finds" the MacBook, which he states contains the contents of the iPhone, but refuses to turn it over;

(9) August 17, 2021 – Respondent files a motion to compel production of electronic devices for examination;

(10) September 2021 – Respondent's motions are heard, and Judge Alex Kinlaw advises he is granting the motion to compel production of the electronic

devices. This begins months of emails and status conferences in an attempt to fashion privilege and privacy safeguards that satisfy Appellant;

(11) March 28, 2022 – Judge Alex Kinlaw issues an order requiring Appellant to submit the electronic devices for independent expert review in order to determine if data had been removed or destroyed; sanctions are held in abeyance;

(12) Appellant both appeals and moves to reconsider this order;

(13) The Court of Appeals dismisses Appellant's appeal, which sought review of an unappealable order;

(14) January 12, 2023 – Judge Kinlaw denies the motion to reconsider and confirms his order of March 28, 2022;

(15) February 10, 2023 – Respondent files a motion for sanctions due to Appellant's failure to comply with the prior court order;

(16) April 28, 2023 – Appellant found to not be in compliance with prior order; court finds Appellant to have acted in bad faith or at least acting in gross indifference to Respondent's rights. Respondent directed to comply with the consent order or have his answer stricken;

(17) Appellant provides MacBook to the designated neutral expert, who notes that data has been manipulated or deleted;

(18) August 24, 2023 – Respondent files a motion to enforce a prior order to strike Appellant's answer;

(19) January 18, 2024 – court declines to impose additional sanctions based on the record before it;

(20) Expert examination of the MacBook continues;

(21) Respondent files another motion for sanctions based upon experts' affidavits noting that Appellant went to great lengths to destroy or secret away important evidence and, independently, Appellant's failure to take easy steps to preserve his *sub rosa* communications with a witness;

(22) February 28, 2025 – Court orders that Appellant's answer and counterclaim be stricken.

STANDARD OF REVIEW

Rule 37 of the South Carolina Rules of Civil Procedure controls the sanctions available should a party fail to comply with properly submitted discovery requests. In particular, Rule 37(b)(2)(c) provides that a court may strike a party's pleadings should that party not comply with discovery obligations.

A trial court's determination that there has been an abuse of the discovery process, and that the appropriate sanction for that abuse is to strike that party's pleadings, is within the trial court's discretion and should not be overturned unless there has been an abuse of discretion. *Clark v. Ross, 284 S.C. 543, 328 S.E. 2d 91 (Ct. App 1985).* An abuse of discretion may only be found where the party found to have abused the discovery process is able to show that the trial court's conclusion was without reasonable factual support and resulted to prejudice to the rights of that party, thereby amounting to an error of law, or was grounded in an erroneous perception of the law that

prejudicially changed the outcome. *Dunn v. Dunn, 298 S.C. 499, 381 S.E. 2d 734 (1989).* If there is a showing of bad faith, willful disobedience or gross indifference to the rights of the party harmed by the misconduct, a sanction of striking the offending party's pleading is justified. *Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E. 2d 537 (1991).*

Under the abuse of discretion standard, Appellant bears the burden of showing that factual support for the trial court's decision is absent, rather than that there is a factual dispute within the evidence that was before the court. *QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004).*

When the trial court's "thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record of proceedings in a hearing, in a written order, or otherwise, the appellate court will defer to the trial court's exercise of discretion[.]" *Morris v. BB&T Corp., 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023).*

ARGUMENT

The parties to this action had been involved in a long history of litigation against one another. On December 20, 2013, Respondent, through his attorneys, issued a letter to Appellant requesting the preservation of all relevant information, data and devices. (R. pp. 510-14.) There is no evidence that Appellant ever created a document retention plan or made any effort to preserve electronic data and devices upon receiving the 2013 preservation letter. (R. pp. 331-46, 355-60, 1394.) In fact, in his response to the request or the production of devices such as the computer or computers in which the specific

data would have been stored, Appellant initially indicated that he no longer had those devices or data in his control. (R. pp. 331-46, 355-30.) This would, of course, indicate that he failed to undertake any procedure to safeguard and preserve relevant information as previously requested. (R. pp. 510-14.) It was not until confronted with the prospect of sanctions for failure to preserve the devices or data that Appellant changed his position and revealed that he had kept one of those electronic devices. (R. pp. 501-04, 534-35.)

After that, Appellant still balked at producing the MacBook laptop, refusing to comply with the consent order or with Judge Kinlaw's order that put in place safeguards Appellant had requested after he had already agreed to produce it with no safeguards. (R. pp. 31-33, 48, 472-474.) Despite the plain unappealability of Judge Kinlaw's order, Appellant pursued an appeal. (R. pp. 71, 447.) At the time Appellant brought that appeal, it had been well settled for some time under South Carolina law that discovery orders "are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); accord Hamm v. S.C. Pub. Serv. Comm'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994).* The effect of that appeal and Appellant's continued opposition through reconsideration proceedings was to create even more delay in Appellant simply turning over a device for examination that he had already agreed and been ordered to produce. (R. pp. 31-33, 48, 71, 447.)

After Appellant finally turned his laptop over, well past the first two deadlines the court had given him to do so, expert investigation revealed that in or around 2017,

Appellant purposefully deleted information that had been on the laptop, including .bash history data storage. (R. pp. 505-09, 1144-48, 1262-64, 1329-33.) Had it been retained, the .bash data would have provided a roadmap to what internet sites Appellant had used his laptop to access. (R. pp. 1262-64, 1329-33.) It would have aided Respondent in determining the identity of the computer Appellant had remotely accessed through the laptop. (R. pp. 1329-33.) Appellant argues that there is no proof that the deleted information was relevant to issues presented by this case, but the deletion destroyed the ability to determine *whether* the information was relevant. (R. pp. 1329-33.)

This is evidence that, as the trial court found, Appellant acted either in bad faith, willful disobedience of his discovery obligations, or gross indifference to Respondent's discovery rights to see and evaluate the electronic data Appellant knew was at the heart of the case. (R. p. 104.) Because there was no litigation hold, no restriction of routine processes that might incidentally delete data, and no addressing of decommissioned devices or diligence in follow-up or compliance, there is no evidence of good faith or adherence to routine operations. Instead, the expert evidence is that the stored information on the laptop had been deliberately deleted by its user in 2017 in violation of 2013 directive to preserve relevant information, data, and devices and in contravention of Appellant's obligations under the discovery requests Respondent served in 2014 and 2015. (R. pp. 104, 505-08, 1144-48, 1262-64, 1329-33.)

In addition, the evidence is disturbingly one-sided in its indication that Appellant and his co-conspirator Shpetrik deleted their communications that Appellant thought might implicate him in the defamatory attacks on Respondent that this case is about. (R.

pp. 1345-46, 1398-94.) Shpetrik testified that the purpose of deleting the communications was to prevent people like Respondent's counsel from reading them. (R. pp. 1346.) Before Shpetrik revealed their existence in his deposition, Appellant had kept those communications under wraps. (R. pp. 1347-48.)

It is no wonder that, before he faced consequences for failing to preserve it, Appellant told his lawyers he no longer had his laptop or its data. (R. pp. 515-24, 532-34.) It is no wonder that, while the key data that connected the dots was missing from Appellant's computer, the computer did contain files gathered from the internet that were compiled and used in defamatory postings involved in this lawsuit. (R. pp. 112-25, 1237, 1242-43, 1276-98.) Naturally, Appellant was not inclined to admit his engagement in the tortious activities involved, nor did smoking-gun evidence escape his deletion efforts.

1. DID THE TRIAL COURT PROPERLY DETERMINE IN ITS DISCRETION THAT APPELLANT HAD ACTED IN EITHER BAD FAITH, WILLFUL DISOBEDIENCE OR AT A MINIMUM IN GROSS INDIFFERENCE TO RESPONDENT'S RIGHTS UNDER THE APPLICABLE RULES OF DISCOVERY?

In his brief, Appellant has attempted to expand appellate review to reweigh the evidence on whether he complied with discovery. The appeal in this case, however, is confined to whether the trial court abused its discretion in issuing sanctions for Appellant's non-compliance with discovery obligations in general, including his concealment and destruction of communications with a witness, and his violation of multiple court orders in particular.

A trial court's decision to strike a party's answer is within that court's discretion and should not be overturned absent proof of an abuse of that discretion. *Clark v. Ross, supra*. In order to establish that an abuse of discretion has occurred, an appellant must demonstrate that the trial court's decision is without reasonable factual basis, thereby amounting to an error of law. *Dunn v. Dunn, supra.* Under this standard, Appellant must demonstrate the absence of a factual basis for the court's decision, rather than the existence of a factual dispute regarding the trial court's findings. *See Ozo, Inc. v. Moyer, 358 S.C. 246, 594 S.E. 2d 541 (Ct. App. 2004)* (where there is conflicting evidence on an issue, it is up to the trial court as the trier of fact to determine credibility). Accordingly, in this instance it is only necessary to determine if any evidence existed to support the trial court's findings.

Discovery has been held to be the quintessence of preparation for trial. When discovery rights are trampled, prejudice must be assumed. *Scott v. Greenville Housing Authority, 353 SC 639, 579 S.E. 2d 151 (Ct. App. 2003).* The discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co., 356 U.S. 677, 78 S.C. 983, 2 L. Ed.2d 1077 (1958).* The primary purpose of discovery is to ensure that trials are decided by what the facts reveal and not by what facts are concealed. *Welch v. Advance Auto Parts, Inc., 445 SC 640, 916 S.E. 2d 320 (2025).* Appellant's actions left Respondent without the ability to get the evidence to prove his case or defend against the counterclaim, since the jury would be left to make its determination without the information Appellant concealed. (R. pp. 96-98.)

The trial court appropriately documented the factual and legal basis of its decision to strike Appellant's answer. (R. pp. 94-105.) It noted that Appellant had received a pre-suit preservation letter that pointedly asked him to preserve exactly the sort of data that examining experts found had been tampered with. (R. p. 94.) Suit was thereafter filed in 2014 and discovery served. (R. pp. 94, 107-11, 157-67.) After Appellant responded with numerous non-answers and objections, a motion to compel was filed in 2018. (R. pp. 284-85.) Appellant led Respondent's counsel to believe the motion was resolved and corrected, full discovery responses would be forthcoming, but they did not come. (R. pp. 96, 487-89.) A second motion to compel was made. (R. pp. 487-89.) That motion was never heard, because in 2020 Appellant entered into a consent order with Respondent, under the terms of which Appellant was to designate the electronic devices he utilized in 2013 and to produce those devices for inspection. (R. pp. 31-33.)

While Appellant did identify devices, he failed to produce them, saying first that he did not have them, then acknowledging he did have one of them but still refusing to produce it. (R. pp. 51-57, 59-65, 75-76, 94-106.) This led to a motion to compel production and a motion for sanctions being filed in December 2020. (R. pp. 501-49.) The motion to compel the production of electronic devices for inspection was heard and granted by Form 4 order in September of 2021. (R. p. 48.) A more formal order was issued on March 28, 2022. (R. pp. 51-57.) After Appellant had changed his position to note that he did actually have the laptop, he then insisted on safeguards that would make the examination process more costly, cumbersome, and time-consuming. (R. pp. 52-58, 75.) Though Appellant had already agreed to produce the devices without any of those

safeguards, Judge Kinlaw accommodated him and built a multi-step safeguard process into his order compelling the devices' production for a second time. (R. pp. 52-58, 75.) Judge Kinlaw's order required Appellant to submit his devices for an independent expert inspection, partly as a safeguard and partly for that expert to determine if data had been removed or destroyed. (R. pp. 52-58, 75.) Judge Kinlaw held the issue of sanctions in abeyance at that time. (R. p. 60.) Judge Kinlaw issued another order of January 12, 2023, ruling on Appellant's motion to reconsider and confirming his previous order. (R. pp. 75-76.) Judge Kinlaw noted that Appellant was still refusing to comply with the consent order and with his 2022 order. (R. pp. 75-76.)

On February 10, 2023, Respondent filed a motion for sanctions in which he noted that Appellant had continued to disobey the prior court orders and failed to provide appropriate discovery responses. (R. pp. 696-703.) On April 28, 2023, the trial court found Appellant was non-compliant with the previous orders and found that this non-compliance was "in bad faith, willfully disobedient or at a minimum a gross indifference to the [Respondent's] rights." (R. pp. 78-84.) The trial court went on to direct that Appellant was required to fully comply with the March 28, 2022, order of Judge Kinlaw or be fined $7,500.00 and have his answer stricken. (R. pp. 78-84.) On August 24, 2023, Respondent filed a motion to enforce the court's order, asserting that experts had determined that the contents of the laptop had been altered. (R. pp. 1157-60.) On May 29, 2024, Respondent filed another motion to enforce the court's order and sanctions due to his failure to retain evidence and failure to provide all relevant devices, among other

arguments. (R. pp. 1221-24.) That motion resulted in the order that struck Appellant's pleadings. (R. pp. 94-106.)

Having received the preservation letter in 2013, Appellant should have set up what is often called a litigation hold, taking affirmative steps to prevent the destruction or misplacement of devices and data and follow-up steps to ensure preservation. (R. pp. 510-14.) After having been told his evidence would be needed for upcoming litigation, Appellant took no steps at all to preserve it. (R. pp. 507-08, 510-14.)

The affidavits of the neutral expert and the expert retained by Respondent evince that Appellant had undertaken steps, likely in 2017, some four years after the preservation letter and three years after discovery began, to alter or delete information on the laptop. (R. pp. 308-84, 1144-56, 1161-97, 1329-33.) Those expert's affidavits also pointed out that the laptop that had been identified and provided had been used during the relevant time to access another computer remotely – a computing device that Appellant had omitted from his discovery responses. (R. pp. 505-09, 589-93, 1144-56, 1161-97, 1329-33.)

Based upon Appellant's concerted efforts to avoid electronic discovery, his failure to truthfully respond to submitted discovery requests, and his apparent efforts to modify or delete data on the laptop, the trial court had more than sufficient facts to determine that Appellant had willfully defied his discovery obligations and the court orders of August 21, 2020, March 28, 2022, January 12, 2023, and April 28, 2023. (R. pp. 31-35, 51-58, 75-77, 78-84.)

Appellant's actions are similar to those of the appellant in *QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E. 2d 541 (Ct. App. 2004),* in which the appellant was alleged to have possession of a computer belonging to his former employer, which was soon to be his competition. After the appellant in that case delayed turning the computer over for inspection, the court ordered production, and an expert was allowed to examine it. The expert determined that the hard drive for the computer had been reformatted a day before the computer was turned over, effectively erasing the information contained on the computer. The court found the violation of the prior court order was willful, justifying the striking of the violator's pleadings.

Likewise, in this case, not only did Appellant fail to take even simple measures to preserve relevant data and devices, he also undertook a campaign of slowly and consistently refusing to respond to proper discovery requests. (R. pp. 103-104.) When the court intervened, Appellant kept up his failure to comply, disobeying court orders for about three years until he belatedly produced his laptop to a neutral expert. (R. pp. 31-35, 51-58, 59-66, 94-106.) This review provided proof of Appellant's efforts to hide and destroy data, since it became clear that Appellant had modified or deleted data from the laptop. (R. pp. 94-106, 1144-56, 1161-97, 1329-33.) Appellant's choices to engage in these actions destroyed Respondent's opportunity to prove his case, since the nature of the case required extensive discovery of electronically stored data – as Appellant knew. (R. pp. 94-106.) Appellant acted to block access to this data and information on an ongoing basis. This activity by Appellant warranted the sanction of striking Appellant's answer and counterclaim.

2. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY STRIKING APPELLANT'S ANSWER AND COUNTERCLAIM RATHER THAN IMPOSING A LESSER SANCTION?**

Rule 37 of the South Carolina Rules of Civil Procedure provides that if a party fails to obey a discovery order, the trial court may issue orders which are just, including (1) an order directing that certain matters or designated facts are deemed to be established in accordance with the position of the opposing party; (2) an order prohibiting the party from supporting or opposing designated claims or defenses or probability that party from introducing certain matters into evidence; (3) striking all or part of the party's pleadings or rendering judgment by default against the disobedient party; and (4) treating the violation as a contempt of court.

The trial court, after considering the history of the litigation and Appellant's continued, intransigent defiance of discovery obligations and the court's orders, determined that the appropriate sanction was to strike Appellant's answer and counterclaim. (R. pp. 94-106.) Appellant contends that this sanction was overly broad and inappropriately tough. The decision to impose sanctions, however, is within the discretion of the trial court. An abuse of discretion may be found where an appellant is able to demonstrate that the sanctions were imposed without reasonable factual support, resulting in prejudice to the rights of the appellant, thereby amounting to an error of law. *Kershaw Co. Bd. of Education v. United States Gypson Co.*, *302 S.C. 390, 396 S.E.2d 691 (1990).* Where a sanction would be the equivalent of granting a judgment by default, the record must support that the disobedient party acted in bad faith, willful disobedience, or gross indifference to the rights of the respondent. *QZO, Inc. v. Moyer, supra.*

As noted above, in this case there is abundant evidence to support the trial court's decision to strike Appellant's answer and counterclaim. Let us look at a few highlights. Appellant used his laptop to access another computer remotely, yet he never mentioned that other computer in the course of discovery that ran for around 11 years. (R. pp. 100, 1148, 1329-33.) That concealment prevented Respondent and each of the experts in the case from gaining any access to that computer for examination. After stalling for around three years after his entry into the consent order requiring him to produce his electronic devices, and after disobeying more than one follow-up order that also directed him to produce the devices by set deadlines, Appellant finally produced one of them. (R. pp. 31-35, 94-106.) Expert examination revealed that, after this suit was brought and discovery served, Appellant deleted data from the produced laptop, including data that would have revealed his internet activity. (R. pp. 1161-97, 1223-43, 1329-33.) In addition, Appellant's erstwhile compatriot Shpretrik communicated with Appellant using Telegram's auto-destruction feature, yet Appellant never revealed the existence of the communications, much less took a step to preserve them that was as easy as pressing a button on his phone. (R. pp. 94-106, 1344-48, 1386-88, 1393-94.)

It comes as no surprise that Appellant vigorously resisted producing any electronic devices. The laptop he did produce evidenced his tampering with and destruction of data. (R. pp. 94-106, 1144-49, 1161-97, 1329-33.) As the examining experts noted, the laptop contained numerous files that were used by someone to compile defamatory internet posts about Respondent. (R. pp. 1144-49, 1161-97, 1329-33.) That is either a

remarkable coincidence or yet another indication that Appellant destroyed the data that linked him to the authorship and dissemination of the defamatory statements.

Similarly to this case, in *Griffin Grading and Clearing, Inc. v. Tire Service Equipment Manufacturing Co., Inc., 334 S.C. 193, 511 S.E. 2d 716 (Ct. App. 1999),* the parties had entered into a consent order requiring the appellant to answer discovery. The appellant failed to do so, prompting motions to compel and a contempt citation. The appellant, despite being cited for contempt, continued to refuse to comply with discovery. The court found that the appellant had engaged in a pattern of non-compliance, which constituted bad faith or willful disobedience. The trial court struck the appellant's answer. This court affirmed.

In *QZO, Inc. v. Moyer, supra,* the appellant was in possession of a computer believed to contain evidence of the appellant's wrongful acts. When ordered by the court to produce the computer, the appellant delayed production for approximately a week. When the computer was finally produced, the respondent's expert determined that the hard drive had been reformatted after the court's order, effectively erasing any information which the computer might have contained. The trial court found that the appellant had willfully violated its order and intentionally destroyed evidence. It therefore struck the appellant's answer, which this court affirmed.

Here, the trial court's ruling was within its discretion. Appellant nonetheless argues that an alternative remedy would be more appropriate. He argues that he provided the MacBook for inspection by experts after being warned in the April 28, 2023 order that his answer would be stricken if there was further non-compliance. What Appellant fails to

acknowledge, however, is that expert inspections revealed that Appellant had deleted or modified the data being sought through discovery. The findings of these experts revealed discovery abuse by Appellant in violation of his duties to preserve and disclose evidence, all undertaken at a time when Appellant was aware the evidence was sought in discovery. (R. pp. 94-106, 1144-49, 1161-97, 1329-33.) The expert evidence, according to the trial court, overcame any hesitancy regarding sanctions. (R. pp. 94-106.) The trial court went on to note that it had given Appellant numerous opportunities to rectify his discovery deficiencies and provide a good faith explanation for those events. (R. pp. 94-106.) Appellant failed to do so.

The trial court rejected a spoliation charge to the jury as an appropriate sanction. Had Appellant been forthright about the remotely accessed computer, his destroyed communications with Shpetrik, and his data destruction, a mere spoliation charge might have been appropriate. The court found Appellant's conduct too egregious, especially since Appellant's actions trampled Respondent's attempts to prove his case. (R. pp. 94-106.) Fines and striking portions of pleadings had previously been threatened but did not persuade Appellant to rectify his conduct. (R. pp. 94-106.) Judge Gravely determined that to do anything less than strike Appellant's answer and counterclaim would only diminish the authority of the court. (R. pp. 94-106.) Based on the evidence and the law, that determination was well within the court's discretion.

Appellant also argues that the sanction is overly broad, since it strikes his counterclaim against Respondent. However, Appellant's acts in modifying or removing data had the effect of eliminating Respondent's truth defense, particularly since the

destroyed and concealed data had the potential to prove the truth of the statements Respondent made about Appellant undertaking to attack and defame him.

Finally, Appellant asserts that Rule 37(f) of the Rules of Civil Procedure, which provides that a court may not impose sanctions against a party for failing to provide electronically stored information lost as a result of "the routine, good faith operation of an electronic information system." There is no proof of Appellant's compliance with a routine, good faith operation of an electronics information system, and there is certainly no proof that the data destruction was the product of routine good faith system operations. (R. pp. 1161-97, 1223-43.) Instead, the evidence shows just the opposite. Appellant did not set up a scheduled backup or archiving function. He did not establish an automatic deletion of information or retention policy. He did not establish a litigation hold or a method of handling decommissioned systems. Instead, he undertook in or around 2017, after having been served with a preservation letter and discovery, to eliminate or modify the data. (R. pp. 1161-97, 1223-43, 1329-33.) This does not qualify as a routine, good faith operation. Indeed, experts who examined the computer determined the data deletion was deliberately performed by the laptop's user. (R. pp. 1161-97, 1223-43, 1329-33.)

The record supports the determination that Appellant acted in bad faith, willful disobedience, or, at a minimum, gross indifference to Respondent's rights. In issuing these strong sanctions, Judge Gravely acted within the discretion the law gives to him and to other trial court judges.

ISSUE 3

DID THE TRIAL COURT PROPERLY DECIDE TO RELY UPON THE NEUTRAL EXPERT AND RESPONDENT'S RETAINED EXPERT TO DETERMINE THAT APPELLANT HAD IMPROPERLY DELETED OR MODIFIED DATA ON APPELLANT'S LAPTOP?

Appellant argues that the expert review of his laptop revealed no data or information indicating that he had participated in a cryptocurrency blackmail scheme against Respondent. Of course, this argument misses the point. Appellant modified or deleted data from his laptop, as the reports from the neutral expert and Respondent's retained expert indicate. (R. pp. 1161-97, 1223-43, 1329-33.) If that deleted and modified data included information about the blackmail scheme, Appellant destroyed evidence of his involvement in that blackmail scheme.

Appellant retained his own expert who rendered an opinion that there was no evidence which indicated the data on the laptop had been tampered with. (R. pp. 94-106, 1244-1322.) The trial court, acting within its discretion to evaluate witnesses' credibility, was not convinced by this report but found the reports of the neutral expert and Respondent's expert to be credible. (R. pp. 94-106.)

Appellant argues that there was a difference of opinion between the experts; however, he ignores that the trial court, as the trier of fact, was permitted to make a decision as to which opinions would be relied upon. *See QZO, Inc. v. Moyer, supra*. The appealed ruling was not a grant of summary judgment. The issue is not whether there was a genuine issue of material fact. It is, rather, whether the record contains evidence to support Judge Gravely's ruling and whether there is legal support for it. The answer

to both parts of the question is *yes*. In this case, the trial judge found the neutral expert and the expert retained by Respondent to be credible.

Appellant nonetheless argues that there is no valid evidence or testimony establishing that the data had been deliberately deleted, ignoring the testimony of the other experts. (R. pp. 1161-97, 1223-43, 1329-33.) The argument also ignores the fact that the trial court, acting as the trier of the facts for this matter, had the right and the duty to determine which witnesses and which facts he would rely upon in making his decision. Since there was a basis for his decision, there was no abuse of discretion.

ISSUE 4

DID THE TRIAL COURT PROPERLY DETERMINE THAT RESPONDENT'S DISCOVERY RIGHTS WERE TRAMPLED UPON BY APPELLANT'S ACTS AND FAILURE TO PROPERLY ANSWER THE DISCOVERY, SO AS TO WARRANT STRIKING OF APPELLANT'S ANSWER AND COUNTERCLAIM?

Appellant has argued that he complied with discovery and court orders as best as he could and that the trial court acted excessively and in breach of its discretion in striking his answer and counterclaim. However, the evidence and court orders show otherwise.

Appellant received a preservation letter from Respondent regarding all information, data and devices in December of 2013. (R. pp. 510-14.) If Respondent had adhered to the routine operation of his electronic information system or even taken any interest in the integrity of the electronic data, he would have scheduled data backups and archiving and issued a litigation hold on the relevant devices or at least done something in an effort to preserve them. He did not undertake to do this. Instead, he claimed to have gotten rid of the devices only to turn around and claim to have found his laptop

with its data intact. (R. pp. 31-34, 75.) If he had complied with the preservation letter, the later "misplacement" of the laptop would not have occurred and discovery could have proceeded in a much smoother manner.

Pursuant to the 2020 consent order, Appellant was to designate what devices were to be produced and to provide those devices for inspection. (R. pp. 31-35.) For years following the entry of the consent order, Appellant refused to produce the laptop. (R. pp. 75, 293-384, 472-483.) Only after four orders (R. pp. 31-35, 51-58, 59-66, 75-77, 78-84) and after the court held him in contempt and threatened further sanctions did he finally produce the laptop for inspection by a neutral expert. (R. pp. 89-90, 59-65, 75-77.) It was then discovered that the data had been deleted or modified, contrary to the very purpose of discovery. (R. pp. 1161-97, 1223-43, 1329-33.)

Yet Appellant argues that Respondent has not been prejudiced, since Appellant identified the relevant devices, ultimately produced his laptop to a neutral forensic expert, and no evidence was found that he had committed blackmail. He fails to acknowledge the harm caused to Respondent due to Respondent's inability to investigate Appellant's wrongdoing after he had deleted or modified the most relevant records in the case.

Although the prejudice of the sanctions to Appellant is significant, it is not unwarranted. He has by his actions trampled upon the discovery rights of Respondent. Discovery is the quintessence of the preparation for trial and, when discovery rights are trampled, prejudice must be presumed. *Welch v. Advanced Auto Parts, 445 S.C. 64, 916 S.E. 2d 320 (2025).* This is especially true where a party's discovery abuse has destroyed the opposing party's ability to present evidence to prove his or her case.

ISSUE 5

HAS APPELLANT PRESERVED ALL HIS ARGUMENTS FOR REVIEW?

Among the arguments Appellant makes in his brief are the following:

1) Appellant did not violate discovery orders because, among other things, he falls within the protection of Rule 37(f), SCRCP, which protects a party from sanctions for "failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."
2) Appellant's conduct in refusing to comply with court orders was justified because of fears of misuse of the electronic data by Respondent.
3) Appellant's conduct did not prejudice Respondent because Respondent did not seek a forensic examination of the electronic devices earlier in the case.
4) Appellant's resistance to producing the devices for examination did not cause material delay in this case because the majority of delay is attributable to Respondent.
5) The record does not show Appellant's discovery conduct prejudiced Respondent with regard to the counterclaim.
6) Respondent could not win this case on its merits.

Neither of the two appealed trial court orders here addresses those arguments. (R. pp. 78-84, 94-106.) Appellant did not move to reconsider either of those orders.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. *E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).* "Where a matter is not ruled on by the circuit court, the issue is not

preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." _Vespazziani v. McAlister_, *307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992)*. An appellant's unpreserved arguments cannot prevail on appeal. _E.g._, _Hatfield v. Hatfield_, *327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997)*.

Appellant has failed to preserve these arguments for review. As they form the bedrock of his appeal, Appellant has placed himself in a position from which the arguments in his brief could not win him a victory. That is regardless of those arguments' merits, which, as discussed above, are lacking.

CONCLUSION

Through this appeal, Appellant has sought to have this court reweigh the evidence and re-evaluate anew the trial court's decision to impose the sanction of striking Appellant's pleadings. However, this goes well beyond the scope of review, which is limited to a determination of whether the trial court exceeded its authority and abused its discretion. In undertaking this review, the trial court's determination is to be affirmed unless there is no factual basis for its determination that Appellant acted in bad faith or at the very least in gross disregard of Respondent's discovery rights. As argued above, there is a plentitude of evidence supporting the trial court's ruling. In particular, this ruling is appropriate in light of the fact that expert testimony supports the finding that Appellant deleted or modified data on his laptop in or around 2017 after receiving a pre-suit preservation letter and then discovery requests in this suit. The data was essential to Respondent's case and his defense of the counterclaim.

Here, the trial court's "thought process of applying sound principles of law to the court's view of the facts and circumstances is evident in the record[.]" *Morris, 438 S.C. at 587*. Appellant has not established that Judge Gravely abused his discretion. Efforts by parties to control the outcome of litigation by destroying evidence should not be tolerated and warrant the sanction of striking the pleading of that party.

Respectfully submitted,

/s/ Andrew S. Radeker

David L. Moore Jr.
S.C. Bar No. 1509
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4600
dmoore@turnerpadget.com
and
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
Attorneys for Respondent

November 18, 2025

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In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Judge

App. Case No. 2025-000364

Richard A. Gorman, ...Respondent,

v.

John C. Monarch, ... Appellant.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing Respondent's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
PO Box 6903
Columbia, SC 29260
T: 803-500-0891
drew@radekerlaw.com
and
David L. Moore, Jr.
SC Bar No.: 4050
Turner Padget Graham & Laney, P.A.
PO Box 1509
Greenville, SC 29602
T: 864-552-4625
dmoore@turnerpadget.com
Attorneys for Respondent

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/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
PO Box 6903
Columbia, SC 29260
T: 803-500-0891
drew@radekerlaw.com
and
David L. Moore, Jr.
SC Bar No.: 4050
Turner Padget Graham & Laney, P.A.
PO Box 1509
Greenville, SC 29602
T: 864-552-4625
dmoore@turnerpadget.com
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PROOF OF SERVICE

I certify that I have served the foregoing Final Brief of Respondent on the date given below by emailing it to the other counsel of record in this appeal at the address(es) noted below.

Steven Edward Buckingham, Esq., at *seb@buckingham.legal*

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Attorney for Respondent

November 18, 2025